

Internal Revenue Service

Memorandum

CC:TL:TS

JFOSENBERG

date: MAR 28 1989

to: Director, Office of Coordinated Examination  
Attn: Scott Silvers

EX:C

from: Assistant Chief Counsel, Tax Litigation Division

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subject: Possible Modification of I.R.C. § 6707 Notice of Assessment

This memorandum responds to your request for tax litigation advice dated January 29, 1989, regarding whether the I.R.C. § 6707 Notice of Assessment should be modified in light of the recent decision in Planned Investments, Inc. v. United States, Civil No. G-86-938, slip op. (W.D. Mich. March 28, 1988), appeal pending No. 88-1668 (6th Cir.). For the reasons discussed below, it is our recommendation that the section 6707 notice should not be modified at this time.

DISCUSSION

I.R.C. § 6111(a) requires a promoter of a tax shelter to register the tax shelter with the Service before any interests are offered for sale. Failure to comply with the registration requirements of section 6111(a) may result in the assessment of penalties under section 6707. I.R.C. § 6707 provides that:

**(a) Failure To Register Tax Shelter.-**

**(1) Imposition of penalty.-**If a person who is required to register a tax shelter under section 6111(a)-

(A) fails to register such tax shelter on or before the date described in section 6111(a)(1), or

(B) files false or incomplete information with the Secretary with respect to such registration, such person shall pay a penalty with respect to such registration in the amount determined under paragraph (2). No penalty shall be imposed under the preceding sentence with respect to any failure which is due to reasonable cause.

**(2) Amount of penalty.-**The penalty imposed under paragraph (1) with respect to any tax shelter shall be an amount equal to the greater of-

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(A) 1 percent of the aggregate amount invested in such tax shelter, or

(B) \$500.

(b) **Failure To Furnish Tax Shelter Identification Number.-**

(1) **Sellers, etc.-**Any person who fails to furnish the identification number of a tax shelter which such person is required to furnish under section 6111(b)(1) shall pay a penalty of \$100 for each such failure.

(2) **Failure to include number on return.-**Any person who fails to include an identification number on a return on which such number is required to be included under section 6111(b)(2) shall pay a penalty of \$250 for each such failure, unless such failure is due to reasonable cause.

The method of assessing section 6707 penalties is governed by statutes and regulations. In this regard, section 6671 provides that the liabilities contained in the subchapter concerning "Assessable Penalties" in which Section 6707 is found, "shall be assessed and collected in the same manner as taxes." Thus, the rules under section 6501 concerning the limitations on assessment and collection of taxes are applicable to section 6707.

For purposes of assessing the penalty under section 6707(a)(1)(A), if the person required to register the tax shelter fails to do so, the penalty may be assessed at any time. Section 6501(c)(3). If such person merely registers the tax shelter after the required date, the penalty must be assessed within three years of registering the tax shelter. Section 6501(a). The penalty under section 6707(a)(1)(B), which applies if a person files false or incomplete information with the Service, must be assessed within three years from the date the information was filed with the Service. Section 6501(a). The penalty under section 6707(b)(1) is asserted against a seller of an interest in a tax shelter who fails to furnish the registration number of the shelter to the purchaser in a written statement. Since no statement is being filed with the Service, the section 6501(a) limitation period on assessment does not apply, and the penalty may be assessed at any time. The penalty under section 6707(b)(2) is asserted for failure to include a tax shelter registration number on a return on which such number is required. The penalty must be assessed within three years of filing the return with the missing identification number to the Service. Section 6501(a).

Once an assessment of tax is made, section 6303 requires the Service to provide the person liable for the unpaid tax with notice of the assessment, stating, "the amount and demanding payment." The current I.R.C. § 6707 Notice of Assessment, in addition to providing general information about when the section 6707 penalty applies, and the amount of the penalty due, also includes the words "Tax Period." Pursuant to Form 8278, which is used by revenue agents in computing and assessing miscellaneous penalties including that under section 6707, the tax period stated on the notice should be, "the year in which the document was filed or required to be filed." Therefore, if a person required to register a tax shelter on January 1, 1987, registered the shelter on January 1, 1988, the tax period used for purposes of assessing the section 6707 penalty would be December 31, 1987.

In a memorandum from our office dated August 25, 1988, we recommended that the words "Tax Period" be eliminated from the I.R.C. § 6700 Notice of Assessment, and that the notation "CIV PEN ASSESSED THROUGH" be added. These changes came as a result of the district court case Planned Investments, Inc. v. United States, supra, where the Court held that the section 6700 Notice of Assessment is invalid because the notice failed to state the entire tax period during which the section 6700 conduct occurred. The Government is currently appealing Planned Investments, and taking the position that since the section 6700 penalty is computed on a transactional basis, the penalty assessment is not tied to any specific tax period, such as a taxable year. Thus, the taxable period during which the penalized conduct occurred need not be stated on the notice.

In light of the pending appeal of the Planned Investments case, we do not recommend making any changes to the section 6707 notice of assessment at this time. Unlike the section 6700 penalty, three of the four violations for which the Service can assess the section 6707 penalty are tied to a specific tax period. The Planned Investments case, would have no affect on these three section 6707 violations, which amount to almost all of the cases in which the section 6707 penalty is assessed, because the current notice of assessment already states the entire tax period during which these violations occurred.

However, Planned Investments may affect those cases in which penalties are being assessed for violations of section 6707(b)(1). Since violations of section 6707(b)(1) are not tied to a specific tax period, it is often very difficult for revenue agents to determine the exact period when the section 6707(b)(1) conduct occurred. Moreover, we have been informed by your office that many revenue agents when issuing notices of assessments for violations of section 6707(b)(1) are currently stating as the "Tax Period", the year in which the assessment was made. If Planned Investments is affirmed, the Service would then be

required to state on the notice the entire tax period during which the section 6707(b)(1) conduct occurred. However, because the section 6707(b)(1) penalty is assessed in such a small number of cases, we do not recommend any modifications to the current notice pending the outcome of the appeal of Planned Investments. We do recommend that in those limited cases where the section 6707(b)(1) penalty is being assessed, the revenue agents continue to use the current section 6707 notice of assessment which includes the words "Tax Period." Furthermore, pending the appeal of the Planned Investments case, when making penalty assessments for violations of section 6707(b)(1), the "Tax Period" on the assessment notice may refer to the year in which the assessment was made. For all other section 6707 violations, the "Tax Period" should continue to refer to the year in which the document was filed or required to be filed.

Should you have any further questions regarding this matter, please contact Jeff Rosenberg of the Tax Shelter Branch, at 566-3233.

MARLENE GROSS

By:



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